



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL CASE 97 OF 2011**  
**EAST AFRICAN CABLES LTD.....PLAINTIFF**  
**VERSUS**  
**MT. KENYA CABLES LTD.....DEFENDANT**

**R U L I N G**

The defendant through an application dated 28<sup>th</sup> February, 2012 brought under Section 6(1) of the Arbitration Act 1995 and Rule 2 of the Arbitration Rules 1997, and Section 59, Order 46 Rule 1, 2, and 3 Order 51 Rule 1 of the Civil Procedure Rules seeks the following orders:-

- 1. That this Honourable Court be pleased to stay the proceedings in this matter and issue an order and have this matter be referred to arbitration in accordance with the agreement dated 5/6/2009 entered into between the plaintiff and the defendant.***
- 2. That this Honourable Court be pleased to issue orders that the filing of the defence by the defendant herein be stayed pending the hearing and determination of this application.***
- 3. That this Honourable court be pleased to give such orders as may be necessary in this suit.***
- 4. That the costs of this application be in the cause.***

The application is based on the grounds on the face of the Notice of motion being as follows:-

- a. That this Honourable Court has the jurisdiction to issue the orders sought herein.***
- b. That there are sufficient grounds to warrant the stay of proceedings herein in view of the agreement between the plaintiff and the defendant.***
- c. That the application is made in good faith.***
- d. That the plaintiff's suit herein is premature and as the plaintiff has not demonstrated any efforts to refer the matter to arbitration.***

***e. That the subject matter herein is subject to the compromise provisions as may be adopted in the arbitral proceedings.***

***f. That no prejudice will be occasioned to the plaintiff by this application and the arbitral proceedings.***

***g. That it is only fair and just that the orders herein be granted.***

The application is supported by supporting affidavit of Moses Kimura, a director of the defendant company who stated as follows: That the plaintiff filed this suit against the defendant company claiming Kshs.5,970,671/=. That the plaintiff and the defendant had entered into a distributorship agreement on 5<sup>th</sup> June, 2009 as per annexed copy of Agreement marked "MKI". That since then a dispute has arisen between the plaintiff and the defendant as evidenced by the plaint herein. That clause 14.2 of the Distributorship Agreement provides that in event of any dispute or differences arising between the parties in relation to or arising out of the said agreement the parties shall forthwith refer the matter to arbitration. That a dispute has already arisen between the plaintiff and the defendant as the plaintiff is not supplying the defendant with any products and the plaintiff has not attempted a resolution through the arbitration in good faith. That the defendant believes the plaintiff's suit before the court is therefore premature since the defendant is still willing to have the matter resolved through arbitration. That if the matter is referred to arbitration no prejudice or hardship will be occasioned to the plaintiff in this matter. The defendant further stated he has been advised that the court has power to issue orders for arbitration in a matter in which parties had agreed for the matter to be referred for arbitration and in the meantime make a further order staying the proceedings in court.

The plaintiff filed a replying affidavit dated 4<sup>th</sup> June, 2012. The plaintiff's affidavit is sworn upon by Mary Ngunjiri, the Credit Controller of the plaintiff company. The plaintiff stated that, by an agreement dated 5<sup>th</sup> June, 2009 the defendant was appointed to distribute the plaintiff's products for Meru and its environs. That clause 14.2 of the Distribution Agreement provides for Arbitration in event of disputes arising during the performance of the contract. That the plaintiff supplied the defendant with products at variance instances for the purposes of distribution and sale within the defendant's territory.

That it was a term of the agreement that once goods supplied, payment was to be made within 30 days of receipt. That defendant initially made some payments but started defaulting on due dates rendering the account to run into overdue account balances. That as of 4<sup>th</sup> May, 2011 the overdue account balance stood at Kshs.6,020,671/- as per annexed correspondences marked "MNI" (a) and (b). That the outstanding balances are not in dispute. The plaintiff further stated the suit is for a liquidated claim, amount claimed is not in dispute, that there is no dispute whatsoever between the parties, defendant having admitted the claim and pleaded for payment in installments. That as there is no dispute the plaintiff averred that, the arbitration clause is not applicable in this case. That the present application for referring the dispute for arbitration is unfounded, vexatious and an abuse of the court process. That the defendant has no defence to the claim herein. The plaintiff prayed for the defendants' application to be dismissed.

When the matter came for hearing the defendant/applicant was represented by the learned Counsel Mr. Kiogora, whereas the learned Counsel Mr. Kinyua appeared for the defendant.

The issue for consideration in this matter is, whether this matter is subject of an arbitration Agreement and whether the application is properly brought before this court. Whether there is a dispute or difference arising between the parties in relation to or arising out of the agreement, including the interpretation, rectification, termination or cancellation of the agreement.

The learned Counsel for the defendant/applicant Mr. Kiogora relied on the grounds set out on the face of the application and referred court to clause 14.2.1. of the Distributorship Agreement dated 5<sup>th</sup> June, 2009. He argued that all issues whether liquidated or not are covered by the Arbitration Agreement and the plaintiff is estopped from removing itself arbitrary from the provisions of the arbitration as it is binding upon all the parties.

The learned Counsel for the plaintiff/respondent on his part referred to Section 6(1),(b) of the Arbitration Act, 1995 which provides:-

***“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds or .....***

***(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”***

He submitted that when there is an agreement to arbitration between the parties, the court will stay the proceedings and refer the matter to arbitration unless there is no dispute between the parties with the matter agreed to the arbitration. He submitted the matter before the court is not about any dispute as party has performed its part of the contract. That what remains is payment by the defendant following the performance of the contract. That the plaintiff wrote a letter to the defendant demanding the money through annexure “MMIA” to which the defendant replied through annexure “MN 1(b)” dated 4/5/2011 admitting liability. The defendant then proceeded to give proposals on how to settle the claim. The plaintiff’s counsel submitted there is no dispute as the amount in question of Kshs.6,020,671/- is admitted and the prayer in the plaint is that such money be paid.

The plaintiff’s counsel further submitted the defendant/applicant in his supporting affidavit he does not state any, when and what dispute there is and he submitted and proposed to the court there is none. The plaintiff’s counsel prayed for the application to be dismissed and the plaintiff be allowed to enjoy the fruits of the default judgment entered on 27<sup>th</sup> March, 2012 in default of defence.

Mr. Kiogora Advocate for the defendant/applicant reiterated that paragraph 14 of the Distributorship Agreement is very clear that even if there are differences of whatever type the matter has to go to the arbitration. He paused the question, why then has the plaintiff gone to court unless there is a difference?

The first issue for determination is whether the matter is subject of an arbitration Agreement and whether the application is properly brought before this court.

Paragraph 14.2.1 of the Distributorship Agreement dated 5<sup>th</sup> June, 2009 provides:-

***“in the event of any dispute or difference arising between the parties in relation to or arising out of this Agreement, including the interpretation, rectification, termination or cancellation of this Agreement, the parties shall forthwith, upon receipt of a notice in writing from the party claiming such dispute or difference, attempt to resolve the dispute or difference through good faith negotiations. In the event the parties fail to reach a settlement within a period of fourteen(14) Business days either party may refer the dispute or difference to arbitration under the provisions of the Arbitration Act, 1995, pursuant to the provisions of clause 14.2.2.”***

The above-mentioned paragraph clearly provides that in the event of any dispute or difference arising between the parties in relation to or arising out of the above-mentioned ,agreement, including the interpretation, rectification, determination, or cancellation of the agreement, the parties shall forthwith, upon receipt of a notice in writing inform the party claiming such dispute or difference, attempt to resolve the dispute /or difference through good faith negotiations. The parties Counsel agree that this matter is subject of dispute but do not agree on whether there is a dispute or not.

I therefore find that this matter is subject of an arbitration. The other issue for determination is whether this matter is properly before this court.

Section 6(1) of the Arbitration Act, 1995 provides:-

***“6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration***

**agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds –**

**(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or.....”**

Besides the above in case of **AGIP(KENYA) LTD- VS –KIBUTU(1981) KLR 20** Court of Appeal held:

**“ An order for stay of proceedings is an essential prerequisite before a matter can be referred to arbitration as set out in Section 6(1) (b) of the Arbitration Act Cap.49. The application for stay must be made before any step is taken in the suit.**

**An application for stay of proceedings pending the enforcement of the Arbitration clause should be made by way of Notice of Motion supported by an affidavit and cannot be disguised as a point of law in a pleading.**

**The defence and counterclaim in this case constituted a step taken and invoked the jurisdiction of the court, after which it was no longer open for the defendant to apply for stay.”**

In addition to the above case, in the case of **EAST AFRICA POWER AND LIGHTING CO. LTD – VS- KILIMANJARO CONSTRUCTION LTD KLR(1983) 392** Court of Appeal held:

**“If a party is asked to refer a dispute to arbitration pursuant to an arbitration agreement, whether warned or not of the consequence of default, and such party replies that it does not waive the arbitration provision but does not take any other action to initiate or proceed with such arbitration, then such party is not entitled to a stay of proceedings upon filing of a suit.**

- 1. In order to be entitled to a stay of proceedings, the steps necessary for a reference to arbitration must be put in motion by the party on its initiative or in response to an invitation by the other party.**
- 2. The court can say that there was readiness and willingness to do all things necessary for the proper conduct of an arbitration if and when, either way, some positive step is taken which would lead to a reference to arbitration and whether the arbitration itself takes off or not is immaterial. Such positive action is one of the prerequisites to an order of stay of proceedings.**
- 4. The termination of the contract and the dispute over the quality of work or payment did not fall within the matters to be referred to arbitration.”**

Further in the case of **Esmailji – V- MISTRY SHAMJI LALJI & CO. (1984) KLR 150** Court of Appeal held:-

**“ It is a condition precedent that before the court can exercise its discretion to make an order staying proceedings the applicant must satisfy the court that the is and was at all times willing to do everything necessary for the proper conduct of arbitration. Failure to show this is to the satisfaction of the court will result in refusal for stay of order.**

**The established principles, governing the grant of stay of proceedings is that:-**

- a. The court is not bound to grant stay but has discretion to grant or not to grant.**
- b. The discretion to grant should not be exercised when strong cause for doing so is shown.**
- c. The burden of proving such strong cause is on the plaintiff.**

**d. In exercising discretion the court should take into account the circumstances of the particular case.**

**e. A mere balance of convenience is not enough.**

**The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings, once this burden has discharged then the burden shifts to the opposing party to show cause why effect should not be given to arbitration clause.**

The instant application, the defendant entered appearance and promptly filed this Notice of Motion seeking an order of stay of proceedings. The applicant did not file any defence and counterclaim. I therefore find that the application is properly brought before court.

The next issue for consideration is whether there is any dispute or difference arising between the parties in relation arising out of the agreement. The applicant in his application has not specifically stated the nature of the dispute or differences between itself and the defendant. The applicant's affidavit in support of the application is silent on the dispute or difference between the parties. It is not enough for the applicant to aver that the Distributor Agreement provides that in event of any dispute or differences arising between the parties in relation to or arising out of the said agreement the parties shall forthwith refer the matter to arbitration without disclosing the nature of the dispute. The applicant has not challenged the plaintiff's claim of the liquidated sum in anyway. The defendant has admitted the plaintiff's claim and offered to pay through its letter dated 4/5/2011. The defendant has not challenged the plaintiff's failure to perform its part of contract. The defendant has not pointed out any breach of the contract on part of the plaintiff. The defendant has not pointed out any blame on part of the plaintiff.

The onus of proving the matters in dispute fell within a valid and subsisting arbitration clause referred to by the applicant is on the party applying to the court for stay of proceedings, once the burden has been discharged then the burdenshifts to the opposing party to show the cause why effect should not be given to the arbitration clause. The defendant who is the applicant in his application has failed to specifically state the nature of the dispute and that it fell within a valid and subsisting arbitration clause. The opposing party has demonstrated that the applicant has not stated what is the matter in dispute. The defendant failed to state any dispute, if any, is over what or on what as regards the Distribution Agreement.

Each party to the Distributorship Agreement has performed its part of the contract and what remains is payment by the applicant following the plaintiff's performance of its part of the agreement. The dispute or delay or failure for payment after performance of contract did not fall with the matters to be referred to arbitration.

The dispute to be referred to arbitration werestated in clause No.14.2.1 and they were on:-

- 1. Dispute or differences arising out of the Agreement.**
- 2. Interpretation of the contract**
- 3. Rectification of the contract**
- 4. Termination or cancellation of the contract**

It is clear that dispute over payment did not fall within the matters to be referred to arbitration. Had that been so the plaintiff would have gone to the arbitration before it deferred or withhold further deliveries of the products to the defendant/applicant. Clause 16.5. of the Distributorship Agreement provides if a dispute arises between the principal and the Distributor in relation to the amount outstanding by the Distributor the parties will attempt to resolve the same within three (3) days of the Distributor raising the matter in dispute. That if the parties are unable to resolve such a dispute within such a period the distributor will be required to pay the amount demanded by the Principal and thereafter either

continue with its attempts to resolve the matter in dispute amicably or resort to the dispute resolution mechanism set out in Section 14. I find in this matter that no dispute had arisen between the plaintiff and the defendant in relation to the amount outstanding by the distributor and no attempt was taken to resolve a dispute within 3days as there was none at all.

I further find that as per paragraph 16.5 of the Distributorship Agreement payment is not one of the disputes envisaged under Paragraph 14.2.1 of the Distributorship Agreement. It can only become a matter for arbitration only if the Distributor disputes the amount and takes steps as per paragraph 16.5. of the Distributorship Agreement.

In the circumstance of this case the application is dismissed and I make the following orders:-

- 1. That I decline to exercise my discretion to stay the proceedings in this matter and refer the same to arbitration in accordance with the provisions of the Distributorship Agreement.**
- 2. That I decline to exercise my discretion to stay the filing of defence by the defendant.**
- 3. Costs of the application to the plaintiff/respondent.**

Right of Appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF JUNE, 2012**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

1. Mr. Omari h/b for Kiogora for the applicant/defendant
2. Mr. Kitheka for Kinyua for the 1<sup>st</sup> respondent/plaintiff

**J. A. MAKAU**

**JUDGE**